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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
The unloaders	3
The truckers	4
Specification of errors to be urged	9
Summary of argument	10
Argument	14
I. The test to be applied in interpreting employment under the Social Security Act	14
A. The principles of the Hearst case are applicable under the Social Security Act	15
B. The relation between the tort test and that to be applied under the Social Security Act	26
C. The regulations	34
D. The proposed 1939 amendment	41
II. The workers here involved are employees of respondent	45
A. The factors to be stressed under the Social Security Act	45
B. The common law or tort liability test	46
The unloaders	47
The truckers	53
C. This Court is not bound by the findings of the courts below	58
Conclusion	60
Appendix: Social Security Act and Treasury Regulations	61

CITATIONS

Cases:	
Allaby v. *Industrial Commission*, 200 Wis. 611	49
Allied Mutuals Liability Insurance Co. v. *DeJong*, 209 N. Y. App. Div. 505	49
American Oil Co. v. *Fly*, 135 F. 2d 491	23, 38, 42, 59
Amond, In re Estate of, 263 Iowa 306	54
Anglim v. *Empire Star Mines Co.*, 129 F. 2d 944	38
Baumgartner v. *United States*, 322 U. S. 665	58
Becker v. *Loew's Inc.*, 133 F. 2d 889	59
Bedford Pulp & Paper Co. v. *Early*, decided April 6, 1944, P-H Social Security Tax Service, Vol. 1	38, 57
Benjamin v. *Fertilizer Co.*, 169 Miss. 162	47

Cases—Continued

	Page
Bowles v. *Seminole Rock & Sand Co.*, 325 U. S. 410	37
Bradley v. *Republic Creosoting Co.*, 281 Mich. 177	52, 53
Bridges v. *Wixon*, 326 U. S. 135	59
Burns v. *Eno*, 213 Iowa 881	54
Burruss v. *B. M. C. Logging Co.*, 38 N. M. 254	51, 52, 53, 54
Burt v. *Davis-Wood Lumber Co.*, 157 La. 111	50, 54
Carter Oil Co. v. *McQuigg*, 112 F. 2d 275	3
Chicago, R. I. & P. Ry. Co. v. *Bennett*, 36 Okla. 358	47
Chicago, R. I. & P. Ry. Co. v. *Bond*, 240 U. S. 449	47
Coppes Bros. & Zook v. *Pontius*, 76 Ind. App. 298	50, 53
Decatur Ry. Co. v. *Industrial Board*, 276 Ill. 472	47, 50
Deecy Products Co. v. *Welch*, 124 F. 2d 592	23, 59
Dobson v. *Commission*, 320 U. S. 489	59
Dunn v. *Reeves Coal Yards Co., Inc.*, 150 Minn. 282	54
Duquesne Club v. *Bell*, 127 F. 2d 363, certiorari denied, 317 U. S. 638	59
Frost v. *Blue Ridge Timber Corp.*, 158 Tenn. 18	54
Funk v. *United States*, 290 U. S. 371	32
Glenn v. *Beard*, 141 F. 2d 376, certiorari denied, 323 U. S. 724	23, 38, 45
Glenn v. *Standard Oil Co.*, 148 F. 2d 51	24, 38
Glielmi v. *Netherland Dairy Co.*, 254 N. Y. 60	30
Government Personnel Auto. Ass'n. v. *United States*, 124 F. 2d 99	59
Grace v. *Magruder*, 148 F. 2d 679, certiorari denied, 326 U. S. 720	23, 30, 45, 47, 52
Grand Rapids Gravel Co. v. *United States*, decided March 30, 1943 (1 P-H Social Security Tax Service)	57
Greyvan Lines v. *Harrison*, 156 F. 2d 412, pending on certiorari No. 673	24
Gulf Refining Co. v. *Brown*, 93 F. 2d 870	58
Helvering v. *Davis*, 301 U. S. 619	20
Himmel Bros. Co. v. *Serrick Corp.*, 122 F. 2d 740	59
Holmes v. *Railroad Co. et al.*, 49 La. Ann. 1465	47, 50
Hurtado v. *California*, 110 U. S. 516	32
Industrial Commission v. *Bonfils*, 78 Colo. 306	51, 53
Industrial Commission v. *Hammond*, 77 Colo. 414	54
Jones v. *Goodson*, 121 F. 2d 176	23, 38, 51
Kirk v. *Lime Co. and Insurance Co.*, 137 Me. 73	52, 54
Kuhn v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704	3, 59
Lee v. *Mark H. Brown Lumber Co.*, 15 La. App. 294	54
Local No. 6167 v. *Jewell Ridge Coal Corp.*, 145 F. 2d 10, affirmed, 325 U. S. 161	59
Maher v. *Coal & Coke Co.*, 323 Mo. 799	54
Martin v. *Republic Steel Co.*, 226 Ala. 209	47, 50, 52
McGowan v. *Lazeroff*, 148 F. 2d 512	24, 38
Magruder v. *Yellow Cab Co.*, 141 F. 2d 324	38

Cases—Continued	Page
Muncie Foundry, etc., Co. v. *Thompson*, 70 Ind. App. 157	47, 50
Murray v. *Noblesville Milling Co.*, 131 F. 2d 470, certiorari denied, 318 U. S. 775	59
Murray's Case, 130 Me. 181	47, 50
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	10, 16, 17, 18, 19, 23, 27, 32, 33, 36, 44, 59
Nevins, Inc. v. *Rothensies*, 151 F. 2d 189, affirming per curiam 58 F. Supp. 460	24
Norton v. *Day Coal Co.*, 192 Iowa 160	54
Pure Baking Co. v. *Early*, decided March 24, 1943, P-H Social Security Tax Service, Vol. 1	38
Ridge Country Club v. *United States*, 135 F. 2d 718	21, 59
Rouse v. *Town of Bird Island*, 169 Minn. 367	53
Sabella v. *Brazileiro*, 86 N. J. L. 505	53
Sadler v. *Henlock*, 4 E. & B. 570 (Q. B. 1854–1855)	48
Showers v. *Lund*, 123 Neb. 56	51, 52, 54
Singer Mfg. Co. v. *Rahn*, 132 U. S. 518	57
Social Security Board v. *Nierotko*, 327 U. S. 358	22, 41
Southern Surety Co. v. *Shoemake*, 24 S. W. 2d 7 (Tex. Com. App.)	54
Staply, William Edward, Matter of, Social Security Case No. 12-338, decided January 4, 1945	39
State ex rel. Northfield v. *District Court*, 131 Minn. 352	53
State Farm Mutual Auto Insurance Co. v. *Bonacci*, 111 F. 2d 412	3
Steward Machine Co. v. *Davis*, 301 U. S. 548	20
Stone v. *United States*, 55 F. Supp. 230	38
Sun Insurance Office, Ltd. v. *Be-Mac Transport Co.*, 132 F. 2d 535	3
Swift & Company v. *Alston*, 48 Ga. App. 649	47, 48, 52
Texas Co. v. *Higgins*, 118 F. 2d 636	23, 38, 44
Thompson v. *Twiss*, 90 Conn. 444	53
United States v. *Aberdeen Aerie, No. 24*, 148 F. 2d 655	24
United States v. *American Trucking Association*, 310 U. S. 534	16
United States v. *Appalachian Power Co.*, 311 U. S. 377	58
United States v. *Anderson*, 108 F. 2d 475	59
United States v. *Armature Rewinding Co.*, 124 F. 2d 589	59
United States v. *Mitchell*, 104 F. 2d 343	3
United States v. *Mutual Trucking Co.*, F. 2d 655	38, 42, 45, 57
United States v. *Rosenwasser*, 323 U. S. 360	56
United States v. *Vogue, Inc.*, 145 F. 2d 609	23
United States v. *Wholesale Oil Co.*, 154 F. 2d 745	24
Vaughan, Ella L., Matter of, Social Security Case No. 4-454, decided December 19, 1946	25
Walling v. *Rutherford Corp.*, 156 F. 2d 513, pending on certiorari No. 562	25
Warner v. *Hardwood Lumber Co.*, 231 Mich. 328	52, 54

Cases—Continued Page

Wass v. *Bracker Construction Co.*, 185 Minn. 70 48
Waters v. *Pioneer Fuel Co.*, 52 Minn. 474 54
Willard Sugar Co. v. *Gentsch*, 59 F. Supp. 82 ..... 38, 57
Williams v. *United States*, 126 F. 2d 129, certiorari denied, 317 U. S. 655 59

Statutes:

Internal Revenue Code, as amended:

Secs. 1400 63
1401 (a) 63
(b) 63
1410 63
1426 (a) 63
(b) 63
1600 63
1607 (b) 63
(c) 63

National Labor Relations Act, 49 Stat. 449 16

Social Security Act, c. 531, 49 Stat. 620 (42 U. S. C. 1001 *et seq.*) 16

Secs. 801 61
802 (a) 61
804 61
811 (a) 62
(b) 62
(3) 52
901 62
907 (a) 53
(b) 62
(c) 62

Miscellaneous:

A & C Mimeo. No. 5722, July 22, 1944 44
20 A. L. R. 745 48
Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale Law Journal 76 (1945) 27, 29
Cooley, *Torts*, Vol. 2, (3d ed.) 1098 47
Federal Rules of Civil Procedure: Rule 52 (a) 58, 59
H. Conference Rep. No. 1461, 76th Cong., 1st sess., p. 14 (1939–2 Cum. Bull. 593) 43
H. Doc. 595, 79th Cong., 2d sess. 25
H. R. 6635, 76th Cong., sec. 801 (b) 42
H. Rep. No. 615, 74th Cong., 1st sess., pp. 2–8, 14–16 ..... 20, 22
H. Rep. No. 728, 76th Cong., 1st sess., p. 76 43
65 L. R. A. 495 48
Reorganization Plan No. 2 of 1946, effective July 16, 1946 25
Report of the President's Committee on Economic Security (Government Printing Office, 1935) 20
Restatement of Agency:
Sec. 220 ..... 11, 27, 28, 47
P. 486 ..... 16, 48

Miscellaneous—Continued

	Page
Seavey, *Speculations as to "Respondeat Superior"* (Harvard Legal Essays (1934) 443, 458, n. 9	28
Shearman & Redfield, Vol. I, *Negligence* (Rev. ed.) 399	47
Smith, *Master and Servant* (1906 ed.) 299–301	47
Social Security Board Regulations:	
No. 3, 20 C. F. R. 1944 Supp. 403.710 (e)	25
403.804	34, 35
S. Rep. No. 628, 74th Cong., 1st sess., pp. 2–16	20, 22
S. Rep. 734, 76th Cong., 1st sess., p. 75 (1939–2 Cum. Bull. 565)	43
S. S. T. 198, Cum. Bull. 1937–2, p. 393	44
S. S. T. 259, Cum. Bull. 1938–1, p. 397	44
S. S. T. 307, Cum. Bull. 1938–2, p. 279	44
Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harvard Law Review 70	60
Thompson, Vol. I, *Negligence* (2d ed.) 568–570	47
Treasury Regulations 90, Art. 205	34, 47, 63
Treasury Regulations 91, Art. 3	65

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OPINIONS BELOW

The opinion of the District Court (oral statement R. 84–87) is not reported. The opinion of the Circuit Court of Appeals (R. 89–92) is reported at 155 F. 2d 356.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 19, 1946 (R. 92). The petition for a writ of certiorari was filed on July 18, 1946, and granted October 21, 1946 (R. 92). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether certain persons when unloading coal from freight cars into the bins of the taxpayer, a retail coal dealer, were performing services as his employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

2. Whether certain other persons when engaged in hauling coal for the taxpayer were performing services as his employees within the meaning of Section 811 (b) and 907 (c) of the Social Security Act and Sections 426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set forth in the Appendix, *infra*, pp. 61–65.

STATEMENT

Respondent is a retail coal dealer in Topeka, Kansas, with a large and extensive retail coal business. Respondent brought this action for refund of taxes levied and collected by the petitioner under Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the Internal Revenue Code, for the years 1936 through 1939. The tax was levied with respect to amounts paid by respondent to certain persons known as "unloaders" who unloaded the respondent's coal from freight cars into his

storage bins and "truckers" who later hauled the coal to the respondent's customers. The sole issue between the parties in the court below was whether or not these persons were engaged in performing the unloading and hauling services as employees of the respondent within the taxing provisions (R. 13–14).

The facts are not in dispute.[1]

The unloaders.—The evidence as to the unloaders is very brief; it consists of the testimony of respondent himself (R. 43–44, 46–47), of one of the unloaders (R. 70–73), and of a former assistant of respondent (R. 55), all of whom testified as witnesses for respondent. The unloaders fixed their own hours and worked when they pleased (R. 44, 71). The unloader who testified stated that during the winter season he worked for respondent "about two-thirds of the time unloading, and the rest of the time would be

[1] The findings (R. 6–9) as to facts, as distinguished from conclusions, are in the main—though not entirely—accurate so far as they go. But as is not uncommon with respect to findings prepared by counsel (R. 86), the findings omit many of the undisputed facts which might lead to a different conclusion. Inasmuch as the facts in the short record are not disputed, it seems appropriate in the circumstances to base this statement upon evidence; *Sun Insurance Office, Ltd.* v. *Re-Mac Transport Co.*, 132 F. 2d 535 (C. C. A. 8); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (C. C. A. 7); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (C. C. A. 8); *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704 (C. C. A. 3); *State Farm Mutual Auto Insurance Co.* v. *Bonacci*, 111 F. 2d 412, 414–415 (C. C. A. 8).

part time in the yard when I felt like working" (R. 72).[2] Respondent testified that a lot of the men were floaters, and that some have unloaded for different yards (R. 44). Unloaders were paid by the ton, except when a car was hard to unload, in which case they were paid by the hour (R. 43, 73). Payment was on Saturday night for the week, although when needed the amount could be drawn during the week (R. 71). The workman provided his own shovel and pick (R. 71).

Respondent testified that the yard foreman told the men "what to unload, where to unload it. He supervised." (R. 46), that the men "did what he told them to do" (R. 46), although he did not direct them in their duties (R. 46), that the men were only instructed "to unload the cars and where to throw" the coal, to "haul the coal, and unload it" at a certain place, and "not to break the coal more than they can help it" (R. 44). Respondent's former bookkeeper and assistant testified that "the only instructions I know was to put the coal at a certain place and to unload it as quickly as possible" (R. 55).

The truckers.—The persons who deliver respondent's coal own their own trucks, and provide their own supplies and other equipment (R. 21),

[2] The latter reference is to miscellaneous screening and cleaning up in the yard which respondent apparently does not claim to be work exempt from the Social Security Act (R. 47).

except that respondent provides chutes in the small proportion of cases where they are needed (R. 29). They are paid by the ton out of the price received by respondent from his customers (R. 21.) They are paid weekly, but could and frequently did draw in between times (R. 40, 51). Respondent requires that the trucks be insured, pays the premiums, and deducts 5¢ a ton for the premiums paid up to the amount of the premiums (R. 40). The truckers make C. O. D. deliveries when requested, collecting the amount due for respondent (R. 33).

The truckers fix their own hours and come and go when they please (R. 24). There is no written contract with them (R. 24), and they are not given "written instructions" by respondent (R. 29). They are free to, and on occasion do, work for others, including other coal dealers (R. 25, 53). But the evidence is clear that a number of truckers, including all those who testified,[3] work regularly for respondent and obtain the major portion of their income from working for him.

Respondent himself testified that the truckers "usually stick" to him during the winter season, that "they hauled most of them for us, and they didn't haul for others, because we pay more, because our scale is higher than any yard in

[3] The trial judge indicated that he did not wish to have cumulative testimony (R. 66, 73), and respondent indicated that other witnesses would give the same kind of testimony (R. 73).

town" (R. 42). Respondent's assistant admitted that "the same men would show up day after day for a long period over a period of years" (R. 56). Four truckers testified, two for respondent and two for petitioner. The first stated that during the coal season he averaged $150 per month from respondent and $25 from other sources, and that he appeared "pretty regular, as regular as any man is when he has to eat" (R. 64). The second declared that he received about $30 a week from respondent, and from $3–$4 to $15–$20 from outside sources, "and that didn't happen every week" (R. 67–68). He reported pretty regularly at 7 o'clock in the morning (R. 68). The third testified that he "made practically all of [his] income * * * from Mr. Silk" (R. 78), and that he and half a dozen of the men were "regulars", some "coming there through a period of years" (R. 76). The fourth stated that his average earnings from Mr. Silk were $25 a week, and from other people "a couple dollars a month extra" (R. 81), that he had worked for Mr. Silk "about 12 or 13 years" (R. 79), and that he reported "pretty regularly during this period of time" (R. 81).

Respondent testified that about 50 to 100 truckloads of coal were sent out each day (R. 36–37) and stated that there were eight truckers presently on the list (R. 31). Other estimates were around 10 to 12 truckers, with a maximum of 24 (R. 76). (Cf. R. 56.) From this it would appear that each

trucker averaged a number of deliveries per day for respondent.

Although not required to do so, the truckers usually arrive at respondent's place of business early in the morning (R. 49–50, 60, 68, 75). They assemble in a designated building on respondent's premises which they use as their headquarters, and, by their own arrangement, answer in rotation calls from respondent when he receives an order to deliver coal (R. 24, 33, 50). Respondent gives the truckers a ticket stating the name and address of the customer, the type of coal, the amount, whether the coal is to be sprayed before delivery, the time the customer wants it (if the customer has specified), whether the coal is to be stacked at place of delivery, the kind of chute the trucker is to take with him, the price charged, and if the trucker is to collect it (R. 33–34, 50). The trucker has the privilege of not making a delivery; if he rejects the order the next in turn is called (R. 25, 50). Sometimes the customer would or would not want a particular trucker (R. 75–76).

If the trucker accepts the delivery he drives the truck to the proper bin at the respondent's yard (R. 7). He loads it either by hand or an electric conveyor which the respondent provides free of charge (R. 47). He then drives the truck to the address of the customer, unloads the coal and puts it in the customer's bin (R. 7). He is not supervised in these activities. He is not required to

return to the yard after delivery, and may or may not do so (R. 26):

When customers have a complaint that the trucker has not cleaned up properly or has damaged property they notify the respondent who tells the trucker (R. 38–39). If necessary respondent sends someone from the yard to clean up and pays for any damage without charging the trucker (R. 39). One of the truckers testified that he was "sent back" by Mr. Silk to clean up (R. 77). Another stated that Mr. Silk requested him to clean up someone else's job, and paid him for it (R. 80). When truckers broke windows Mr. Silk would pay the customer without charging the trucker (R. 77, 81).

During most of the period in question the truckers did not carry the name or insignia of respondent on their trucks. All four truckers testified that respondent had signs available for the trucks in 1936 or 1937, and that they carried them for a short time, although respondent did not ask them to do so (R. 64–65, 68, 77, 80).[4] The truckers furnish at their own expense any help they might need (R. 22, 55).

[4] The trial court's finding (R. 6) that the trucks did not bear any insignia of respondent apparently overlooked the uniform testimony to the contrary of all the truckers who testified. The years 1936–1937 are among the tax years involved in this case. Mr. Silk had testified that he could not recall having the signs made except that it was years back (R. 26, 37).

Upon the facts just summarized the district court held that both the truckers and the coal unloaders were not employees of the respondent but, instead, were independent contractors, and that the remuneration which he paid to them for their services did not come within the scope of the taxing provisions of the Social Security Act and corresponding sections of the Internal Revenue Code. (R. 10–11, 84–87.) The Circuit Court of Appeals affirmed (R. 88–92).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the persons in question were employees of the respondent and that he was liable for the social security taxes in question.

2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship in holding that the persons engaged in unloading and hauling coal for the respondent were not his employees within the meaning of the Act.

3. The Circuit Court of Appeals erred in failing to consider the simple and manual nature of the work being performed by the persons unloading and hauling coal and in applying a legal concept of the traditional employer-employee relationship so restrictive in its scope as to eliminate all employment except that performed under con-

stant and detailed direction and control by the respondent.

SUMMARY OF ARGUMENT

I

A: In *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, the Court held that the word "employee" "is not treated by Congress as a word of art having a definite meaning", that the common law tests are not to be "made exclusively controlling, without regard to the statute's purposes", and that that term "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship". There is no rational basis for believing that Congress intended the reference to employment in the Social Security Act to embody exclusively the common law definition developed for tort liability purposes more than in the contemporaneous National Labor Relations Act. The persons whom the Social Security Act was designed to protect are those dependent upon the business of another for their work and livelihood.

B. This does not mean that Congress had any wholly new concept in mind when it referred to the employment relationship in the Social Security Act. The workers who are dependent upon others are in general, and in vast majority, those classified as employees for tort and other purposes. But in determining where the line should be drawn, for tort and other purposes,

between the employee and the independent contractor there has been a wide area of doubt and disagreement in which courts arrive at their decisions by balancing various pertinent factors. Among these are "whether or not the one employed is engaged in a distinct occupation or business", and 'whether or not the work is a part of the regular business of the employer". Restatement of Agency, Sec. 220. When the object of the law is the protection of those who work as a part of and are economically dependent upon another's business, those factors which have most significance in relation to that objective should be stressed rather than those which may properly be emphasized when liability for injury is the issue. Furthermore, the dependence of the worker upon the employer which should bring the Social Security Act into play results from his subjection to the employer's economic control, and differs only in shading from the physical control, commonly referred to as of great weight in the tort cases. Many courts, even in tort cases, have found a real and effective power of control to exist when one man is dependent for his livelihood on working for another and the latter has the unfettered right to terminate the relationship at will. There would thus be little or no difference between the result reached under the common law as applied by a number of courts and that which we believe is required under the

Social Security Act interpreted in accordance with the principles of the *Hearst* case.

C. The administrative regulations defining the employment relationship refer both to the common law factors and to the independent nature of the business enterprise as matters to be considered. They do not obviate the necessity of exercising judgment in relation to the weight to be given the various factors, or justify disregard in borderline cases of the statute's objectives. The Social Security Board explicitly, and the Treasury through a broad interpretation of the right to control, have construed the regulations as reaching workers who are in fact subjected to the economic control of the employer. All doubts as to the meaning of the regulation should be resolved, as they have been by the administrative agencies, in favor of the result most consistent with the purposes of the statute.

D. The failure of Congress to adopt an amendment to the Social Security Act for the express purpose of subjecting to coverage salesmen who would not be employees under any definition of employee affords no reason for interpreting narrowly the law which was left unchanged.

II.

The unloaders and truckers here involved are respondent's employees even under a strict common law tort liability rule, as many decisions directly in point attest. But if this view should

not be accepted, these workers unquestionably fall within the borderline area in which the weight of the additional factor of their economic dependence upon and integral relation to the employer's business should be sufficient to shift the balance in favor of coverage. They are engaged in activities which are an essential part of respondent's business. They work steadily for respondent and are as dependent upon him as workers whose employee status is clear. They are subjected to as much control as is required by the nature of the work, and as would have been sufficient for the ordinary employee performing the same tasks. Since respondent could dispense with their services at any time and since they were dependent upon him for their livelihood, nothing further was necessary to bring them within respondent's control. Their work is unskilled, and in the case of the unloaders even menial. That the truckers were regarded as a part of respondent's enterprise is shown by the fact that he held himself responsible to customers for their conduct. The workers' freedom in respect to working hours was largely theoretical. They worked as steadily as ordinary employees. The fact that the truckers owned their own trucks does not prove that they are not employees.

The question whether on the undisputed facts the truckers and unloaders are employees is not a factual one within the meaning of the Rules of

Civil Procedure but one calling for the Court's conclusion of law as applied to the admitted facts. This Court is accordingly not bound by the findings of the courts below.

ARGUMENT

The Social Security Act, both in its tax and benefit provisions, is predicated upon the payment of "wages," defined to be "remuneration for employment." See pp. 61–62, *infra*. With exceptions not pertinent here, employment is defined as meaning "any service by an employee for an employer." See p. 62, *infra*. The questions in this case are (1) what is the proper test to be applied in determining what persons are employees within the scope of the Social Security Act and the corresponding provisions of the Internal Revenue Code, and (2) how that test should be applied to the facts of this case.

I

THE TEST TO BE APPLIED IN INTERPRETING EMPLOYMENT UNDER THE SOCIAL SECURITY ACT

The court below in this case stated in its opinion that the Social Security Act (R. 90):

> * * * is remedial in its scope and should be liberally construed to effectuate its remedial objectives. It may be conceded that the strict common-law concept of employer and employee relationship is not the test for determining such relation-

> ship when it comes into question under the remedial provisions of the Act. * * *

The remainder of the opinion, however, is concerned only with the extent of respondent's control over the details of the activities of the workers (R. 90–92). The court finally based its decision solely on the absence of what it regarded as a "reasonable measure of direction and control over the method and means of performing the services performed by these workers" (R. 92). In applying such a limited standard, we think the court not only treated the common law principles of master and servant as established in tort cases as exclusively controlling, but gave to them an interpretation even more restricted than the principles require.

This doctrine cannot be justified unless it is to be assumed that when Congress used the words "employment", "employer", and "employee", in the Social Security Act it necessarily must be thought to have intended that the words have the narrowest meaning given them at common law.

A. THE PRINCIPLES OF THE *Hearst* CASE ARE APPLICABLE UNDER THE SOCIAL SECURITY ACT

It is necessary to go no further than two recent decisions of this Court to demonstrate that Congress does not invariably use "employment" as a

* By the "common law" meaning we mean that employed in tort cases, including the related workmen's compensation cases.

word of art embodying a common law concept developed in tort cases. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *United States* v. *American Trucking Association*, 310 U. S. 534, 545.[6] The *Hearst* case involved a statute enacted by the same Congress one month before the Social Security Act,[7] and having equally broad, though different, social objectives. In that decision, which quoted from the *American Trucking* case, the Court stated that the word "employee" (322 U. S., at 124–125):

> "is not treated by Congress as a word of art having a definite meaning * * *." Rather "it takes color from its surroundings, * * * [in] the statute where it appears," *United States* v. *American Trucking Assns.*, 310 U. S. 534, 545, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

In words equally applicable to the present case, the Court continued:

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[6] See also Restatement of Agency, p. 486, wherein it is said: "Statutes have been passed in which the word 'servant' and 'agent' have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this Subject."

[7] The National Labor Relations Act became law on July 5, 1935, the Social Security Act on August 14, 1935. See 49 Stat. 449, 620.

* * * Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hair-line variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be consistent with the statute's broad terms and purposes.

* * * * *

The *Hearst* decision makes it plain that the administration of such a statute is not to be "encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at

least, the achievement of the statute's objectives. Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law." 322 U. S., at 125–126. The criterion in interpreting the general term "employee" and applying it to doubtful cases is "the mischief at which the Act is aimed". 322 U. S., at 126.

The problem raised by the *Hearst* case, the Court noted, arises from the fact that (322 U. S., at 126–127): "Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

The result is, the Court concluded (p. 127), in an analysis as applicable to the Social Security Act as to the National Labor Relations Act, that:

> Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes,

> it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. * * *

(322 U. S., at 128):

> * * * when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

(322 U. S., at 129):

> That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given."

We have quoted at great length from the *Hearst* case because it is controlling on the major question presented here. We can conceive of no rational basis for believing that Congress in-

tended the reference to employment in the Social Security Act to embody a strict common law definition any more than in the contemporaneous National Labor Relations Act. Under the Social Security legislation, as fully as under the National Labor Relations Act, "it cannot be irrelevant" that the unloaders and the truckers involved in this case "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate"; or that "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation." Though the purposes of the two laws are not the same, they are sufficiently alike to require similar techniques in bounding the term "employee" as a yardstick of coverage.

The purposes of the plan for old age benefits and unemployment relief embodied in the Social Security Act needs no detailed exposition; they are apparent from the mere description, and have been fully set forth in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 586–589, and *Helvering* v. *Davis*, 301 U. S. 619, 641–644. Both portions of the statute were based upon the experience of the nation in a period of great unemployment when masses of workers could not find work and when permanent unemployment was the lot of a large proportion of the aged. *Ibid;* S. Rep. No. 628, 74th Cong., 1st sess., pp. 2–16; H. Rep. No. 615, 74th Cong., 1st sess., pp. 2–8, 14–16; Report

of the President's Committee on Economic Security (Gov't Printing Office, 1935).

The persons who are most subject to these misfortunes are those who find employment in the business of others, who are dependent upon others to hire them for their livelihood and who, as a class, are themselves helpless in good times to make provision for their needs in times of adversity. *Ibid. Ridge Country Club* v. *United States*, 135 F. 2d 718, 721 (C. C. A. 7). Those persons are in common parlance described as "employees". The vast majority of them are, of course, persons who would be treated as employees for tort liability, workmen's compensation, and other purposes, and it is not improper to regard them generally as persons whose work is controlled by the employer. But on the periphery are many persons whose physical work may not be controlled to any substantial extent, although they work for and are dependent on and are economically controlled by the employer to the same extent as those whose work is subject to control. Such persons would seem to fall within the class of "employees" for social security purposes irrespective of how they may be classified in a field of the law in no way related to the problems which Congress was endeavoring to solve.

The so-called "control test" in the form in which the court below has applied it may be peculiarly fitted to make more equitable the effect of the doctrine of *respondeat superior* where one

person, without fault, may have to answer for an injury done by another; but it bears no natural relationship to the economics of unemployment. Unemployment may occur just as readily where control has been relinquished to the employed because the work is so simple, because it is too technical, because the employer hopes to avoid the legal burdens of an employer, or for any other reason, as where the employer retained full control. And the evils Congress was endeavoring to stamp out are equally great in either case.

The fundamental justification for placing the burden of Social Security taxes on an employer lies in the fact that he is using the labor of others to his own profit and not in the fact that he may or may not choose to retain complete control over the means and manner of doing the work. This burden, like workmen's compensation, constitutes a part of the cost of doing business and Congress intended that it should be so treated. S. Rep. No. 628, *supra*, p. 12; H. Rep. No. 615, *supra*, pp. 8, 16. To draw distinctions between workers performing the same services in competitive businesses solely on the basis of "control" not only serves to exclude persons who are the objects of the Act's protection but places the employer who accepts the social responsibilities of his position under an economic handicap.

The recent decision of this Court in *Social Security Board* v. *Nierotko*, 327 U. S. 358, shows that the definitions in the Social Security Act

are to be liberally construed in the light of the statutory objectives. The Court there held that the phrase "wages"—that is, remuneration for "employment"—included payments to an employee as a result of a Labor Board back pay order during the period when he was idle after being wrongfully discharged for union activities—a period in which the employer could hardly have been held responsible for the workers' torts.

Although prior to the *Hearst* case the circuit courts of appeals had generally held common law principles to be controlling under the Social Security Act,[8] at least four circuits have since indicated that they believe the principles enunciated by this Court in the *Hearst* case equally applicable to the Social Security Act. Of particular importance in this connection is the following statement of Judge Parker for the Fourth Circuit in *United States* v. *Vogue, Inc.*, 145 F. 2d 609, 612, subsequently approved by the Court of Appeals for the District of Columbia in *Grace* v. *Magruder*, 148 F. 2d 679, 680–681, certiorari denied, 326 U. S. 720:

> Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the

[8] E.g., *Glenn* v. *Beard*, 141 F. 2d 376 (C. C. A. 6), certiorari denied, 323 U. S. 724; *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2); *Decoy Products Co.* v. *Welch*, 124 F. 2d 592 (C. C. A. 1); *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10).

> Fair Labor Standards Act, 29 U. S. C. A. § 201 et seq., and the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability. * * *
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> * * * * *
>
> The Social Security Act like the National Labor Relations Act does not define employees, and consequently what was said by the Supreme Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 855, in holding that newsboys were employees within the meaning of the act is pertinent here. * * *
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> * * * * * *

See also *United States* v. *Aberdeen Aerie, No. 24*, 148 F. 2d 655, 658 (C. C. A. 9); *Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189 (C. C. A. 3), affirming *per curiam* 58 F. Supp. 460 (E. D. Pa.). Several other circuits continue to apply the strict common law test, without adverting to or distinguishing the *Hearst* case. *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 53 (C. C. A. 6); *Greyvan Lines* v. *Harrison*, 156 F. 2d 412 (C. C. A. 7), pending on certiorari No. 673; *McGowan* v. *Lazeroff*, 148 F. 2d 512 (C. C. A. 2); *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745 (C. C. A. 10). In the present case the Circuit Court of Appeals for the

Tenth Circuit seems to recognize the propriety of applying the *Hearst* ruling at one point in its opinion and to disregard it thereafter. In *Walling* v. *Rutherford Corp.*, 156 F. 2d 513, pending on certiorari No. 562, the Tenth Circuit has, however, given effect to the *Hearst* doctrine in applying the Fair Labor Standards Act.

The Social Security Board and the Federal Security Agency[9] have also recognized the necessity of defining the employment relationship in the light of the purposes of the statute rather than in common law tort liability terms. In *Matter of Ellis L. Vaughan*, Case No. 4–454, decided December 19, 1946, the Appeals Council[10] stated, citing the *Hearst* and *Vogue* decisions:

> * * * we wish to point out that a decision as to whether an individual is or is not an employee for the purposes of the Social Security Act, as amended, must be determined primarily from the history, terms, and purposes of that Act. The term "employee" is not a word of art having a definite meaning. The term must be construed in the light of the end to be attained by the enactment of the Social Security Act, as amended. The relationship of

[9] The Social Security Board was abolished and its functions transferred to the Federal Security Agency by Reorganization Plan No. 2 of 1946, effective July 16, 1946. H. Doc. 593, 79th Cong., 2d Sess.

[10] The Appeals Council is the final administrative arbiter in passing upon claims for benefit payments. Social Security Board, Regulations No. 3, 20 C. F. R., 1944 Supp., 403.710 (e).

employer and employee for the purposes of the social security program is broader than the narrow technical legal relation of "master and servant," as the common law has developed that relation in all its variations; and at the same time this relationship is narrower than the entire area of rendering service to others. *National Labor Relations Board* vs. *Hearst Publications, Incorporated*, 322 U. S. 111, 64 S. Ct. 851; *U. S.* vs. *The Vogue, Incorporated*, 145 F. (2d) 609 (C. C. A.).

The Social Security Act, as amended, is designed to replace a part of the wage lost through old age and premature death. The purpose of this Act is to afford protection to individuals who render services to others under certain circumstances that, as a matter of economic fact, they are exposed to the risk of such loss of wage income. The greater the degree of economic dependence of an individual upon a particular relationship, the more clearly do the purposes of the Act afford an index of coverage. If the termination of the arrangement under which the services are performed would render the worker unemployed in the ordinary sense of that term, generally the economic status of such worker is that of an employee.

B. THE RELATION BETWEEN THE TORT TEST AND THAT TO BE APPLIED UNDER THE SOCIAL SECURITY ACT

We have said that the common law or tort liability test is not to be regarded as decisive under

the Social Security Act and that the courts in interpreting "employment" should be guided to a large extent by the purposes of the statute in accordance with the doctrine of the *Hearst* case. A more precise statement of our position as to the proper test and its relation to the common law principles may be helpful.

The phrase "common law test" is used to describe the test commonly developed and applied in tort cases. It requires that the courts consider and weigh a number of familiar factors in determining the existence of an employment relationship. See Restatement of Agency, Section 220. It is not an automatic, self-applying standard nor one in which each factor receives a mathematically predeterminable amount of weight. The courts vary greatly in the application of these factors and in the results they reach. See *National Labor Relations Board* v. *Hearst Publications*, 322 U. S., at 121–122, and authorities cited; Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale Law Journal 76 (1945).

The test which we conceive to be appropriate under the Social Security Act does not disregard these factors. Congress did not have any wholly new concept in mind when it referred to the employment relationship. But just as in tort cases some courts emphasize and give more weight to the factors they deem most significant for purposes of apportioning liability, so in this field it

is appropriate to stress the factors which are most significant in relation to economic security. It would thus be fitting to give primary weight to such elements of the relationship as "whether or not the one employed is engaged in a distinct occupation or business" and "whether or not the work is a part of the regular business of the employer". Restatement of Agency, Section 220 (2) (b), (h). Certainly they are more important for the purposes of this statute, and perhaps generally, than the method of payment, who supplies the tools and equipment, the skill required in the particular occupation. Cf. Restatement of Agency, Section 220 (2) (d), (e), (g).

There is even considerable diversity in tort cases as to the content of the so-called control factor, which is often thought to be predominant. Control is itself a factor which may be established by evidence of many kinds. If one man is dependent for his livelihood on working for another, and if the latter has the unfettered right to terminate the relationship, a real and effective power of control will ordinarily exist. In *Speculations as to "Respondeat Superior"* (Harvard Legal Essays (1934) 433, 458, n. 9), Professor Seavey concludes, "It is quite true that in most of the master and servant situations there is no physical control by the master, but the relationship ordinarily carries with it a power of control over the servant through his economic subjection * * *". Many courts have treated this as manifesting sufficient

control to establish the employment relationship. See cases cited *infra*, pp. 50–51.[11] "The absence

[11] "The power of the principal to discharge the employee at will or upon short notice has been given greater prominence by many courts than is indicated by the Restatement. *L. B. Price Mercantile Co.* v. *Industrial Comm.*, 43 Ariz. 257, 30 P. (2d) 491 (1934); *Press Publishing Co.* v. *Industrial Accident Comm.*, 190 Cal. 114, 210 Pac. 820 (1922); *N. Y. Indemnity Co.* v. *Industrial Accident Comm.*, 80 Cal. App. 713, 252 Pac. 775 (1927); *Industrial Comm.* v. *Hammond*, 77 Colo. 414, 236 Pac. 1006 (1925); *Industrial Comm.* v. *Bonfils*, 78 Colo. 306, 241 Pac. 735 (1925); *Aisenberg* v. *O. F. Adams Co.*, 97 Conn. 419, 111 Atl. 391 (1920); *Franklin Coal and Coke Co.* v. *Industrial Comm.*, 296 Ill. 329, 129 N. E. 811 (1921); *Clark's Case*, 124 Me. 47, 126 Atl. 18 (1924); *Matter of Glielmi* v. *Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906 (1930); *Journal Pub. Co.* v. *Unemployment Comp. Comm.*, 155 P. (2d) 570 (Ore. 1945); *Cockran* v. *Rice*, 26 S. D. 393, 128 N. W. 583 (1910). The following statement, from 14 RULING CASE LAW 72, is often quoted in the cases: 'The power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered as a strong circumstance tending to show the subserviency of the employee. Indeed, it has been said that no single fact is more conclusive, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself.' Some courts have held it to be the most important of all factors. *L. B. Price Mercantile Co.* v. *Industrial Comm.*, 43 Ariz. 257, 30 P. (2d) 491 (1934); *Industrial Comm.* v. *Bonfils*, 78 Colo. 306, 241 Pac. 735 (1925). In the *Bonfils* case the court concluded: 'By virtue of its power to discharge, the company could at any moment direct the minutest detail and method of the work.' *Id.* at 308, 241 Pac. at 736. Perhaps in emphasizing the power of discharge the courts are really thinking of the economic dependence of the worker." Asia, *Employment Relation: Common Law Concept and Legislative Definition*, 55 Yale Law Journal, pp. 76, 79.

of a written agreement or contract of hiring only makes the employment more hazardous for the hustler and puts him more completely under appellant's control". *Grace* v. *Magruder,* 148 F. 2d 679, 682 (App. D. C.), certiorari denied, 326 U. S. 720. "If he does anything at variance with the will of his employer, its policy or preference, he knows that his contract of employment may be ended over night". *Glielmi* v. *Netherland Dairy Co.,* 254 N. Y. 60, 63 (per Cardozo, C. J.).

The control evidenced by the right to discharge at will would in itself mark the economic dependence which characterizes the persons whom Congress was seeking to protect in the Social Security Act. Those courts which have applied the control test with a realistic appreciation of the practical effects of such a relationship have tended to reach results not greatly different from those reached by application of the principles of the *Hearst* case. It does not matter to the worker whether his economic dependence on the person he works for is treated as establishing the latter's *de facto* control over him or is used more directly to show that he falls within the purposes of the Social Security legislation.

It thus becomes apparent that the approach which emphasizes the purposes of the statute will in substance result merely in the stressing of factors which are already given great weight by some of the common law courts. There would

indeed be little or no difference between the common law test, as applied by many—though probably not most—state courts in the light of economic realities and that which we think is derived from the words of the Social Security Act read in the light of its purposes. For the dependence of the worker upon the business of another which should bring the Social Security Act into play results from his subjection to the employer's economic control, a factor which differs only in shading from the physical control which may properly be emphasized when tort liability is the issue.

The test which we think should be applied may be summarized as follows:

In the borderland where a worker's status would be doubtful under the tort liability test the economic factors which are related to the purposes of the Act should be controlling rather than factors concerned with the physical performance of the work. And in some cases near the borderline, even where for tort purposes a worker would not be deemed an employee, the emphasis upon those factors which give rise to economic dependence or control might be enough to shift the balance.

Although in this brief and generally in dealing with this subject the "common law test" has been regarded as synonymous with that applicable to tort liability cases, this is not entirely fair to

the flexible processes of the common law.[12] Common law rules are developed in relation to the subject matter of the particular case. In tort cases the judges are properly concerned with the circumstances under which one man should be held financially liable for the misconduct of another. It does not follow that the test found appropriate for that purpose would even at common law be applied where different policy considerations point to a somewhat different rule. In the *Hearst* case this Court recognized that at common law the control test does not have the same significance in different contexts. See 322 U. S., at 120–121, *infra*, pp. 36–37.

Unless courts have now lost the power to mould common law to new situations,[13] there is no reason for assuming that a court guided by the philosophy and principles of the common law would deem the factors determining the existence of the employment relationship for tort liability pur-

[12] "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

* * * * * *

"* * * and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Hurtado* v. *California*, 110 U. S. 516, 530; *Funk* v. *United States*, 290 U. S. 371, 382–383.

[13] *Funk* v. *United States*, 290 U. S. 371, and the cases it cites show that the courts have not lost this power.

poses controlling when protection against unemployment and old age was the issue to be determined. A common law court facing the latter problem would be mindful of the analogy of the tort cases, but it would be careful to observe that in some respects the rules that the courts had fashioned for purposes of vicarious liability stressed some factors and ignored others in a manner not wise and reasonable when the object is security against unemployment. The court properly applying principles of the common law would adjust its formula to fit the problem at hand. This is precisely the proper function of a court in interpreting a statute, so as to apply it to "the mischief at which the Act is aimed" (*Hearst* case, 322 U. S., at 126). Our argument that the purpose of the Social Security Act must be taken into account and given great weight in applying the statute is not therefore in derogation of any common law test, but is in entire accord with true common law principles and common law technique.

Although for the above reasons we believe that there is no conflict between the tests called for by the common law and that required by the purposes of the Social Security Act, it is nevertheless true that a number of courts, such as the court below in this case, have applied only the tort liability doctrine very narrowly construed; they look in the main to who actually controls the details of the physical work. Such an approach is not, we submit, correct even under the common law. It

is our intention to show, however, that whether such a test or the rule we have advocated is the proper doctrine the result must be to hold the workers here involved employees within the meaning of the Social Security Act.

C. THE REGULATIONS

The court below and other lower courts adopting the tort-liability test have relied on the Treasury (and also Social Security Board) Regulations defining the employment relationship. Treasury Regulations 90, Article 205; Social Security Board, Regulation No. 3, 20 C. F. R. 1944 Supp. 403.804, Appendix, *infra*, pp. 63–65. We do not believe that the Regulations were intended to be or should be interpreted as embodying a test for the borderline situation differing from that indicated above.

The Regulations state that:

> *Generally*[14] the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. * * *

In addition, the "right to control", "the right to discharge", "the furnishing of the tools and the furnishing of a place to work" are mentioned as

[14] Italics in this brief are supplied.

factors to be considered. The description of the relationship and the method of compensation are stated to be immaterial if the employment relationship exists. It is further stated that:

> *In general* if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

The Regulation also proceeds to give illustrations of what it means by independent contractor, stating that:

> *Generally,* physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Although the first portion of the Regulation stresses the control factor, the introductory expressions "generally", and "in general" show that this portion of the statement is not all-inclusive but is merely a description of the typical employment relationship. Clearly most of the persons coming within the objectives of the Act will meet such a test. On the other hand, in defining the independent contractor "generally", emphasis is on professional persons and contractors having their own business and offering their

services to the public; such persons would not be within the Act's objective. The Regulation thus defines the typical employee and the typical independent contractor. Quite properly in these definitions the Regulation does not discard the well-established concepts known in other fields. But the definitions are qualified by the use of the terms "generally" and "in general"; and inevitably are not decisive in the "borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." Cf. *Hearst* case, 322 U. S., at 121. The reason is that the great number of factual situations in the borderland defies any generalized formula for simple application. In doubtful cases it is always proper to look to the purposes of the statute, and to give most weight to those factors which will effectuate those objectives.

Since the Regulations indicate that both control and the independent nature of the business—each a factor of importance at common law—are to be considered, it is clear that they do not adopt the former as the exclusive test. Furthermore, "control" in itself is a nebulous concept, the content of which has varied with the subject to which it is being applied. This Court noted in the *Hearst* case that (322 U. S. 120–121 n):

> * * * even at the common law the control test and the complex of incidents evolved in applying it to distinguish an

> employee" from an "independent contractor," for purposes of vicarious liability in tort, did not necessarily have the same significance in other contexts * * *.

As we have already seen, a broad application of the common law tests leads to about the same results as an application of the *Hearst* case. For purposes of the Regulations, read in the light of the known object of the statute, control even over details may properly be inferred from the right to terminate a relationship at will, when coupled with the typical worker's dependence on his job. See pp. 28–30, *supra;* pp. 50–51, *infra.*

That the Regulations should not be given the restrictive construction placed upon them by respondent and the court below appears from the manner in which they have been administratively interpreted. The construction of an administrative regulation by the agency which issues it is, of course, entitled to the greatest weight. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. The Regulation here involved has been promulgated both by the Treasury and the Social Security Board, which until recently administered various portions of the Social Security Act. Both agencies have applied the Act to many persons, who, not being engaged in an independent business of their own, are from an economic standpoint dependent upon those for whom they are performing services, even though some courts applying

tort principles would not find such persons to be employees.

The Bureau of Internal Revenue reaches that result by liberally interpreting the concept of "control" in the Regulations. That the Bureau interprets its regulations as covering the types of persons involved in these cases is, of course, shown by the fact that it has attempted to collect Social Security taxes both from Mr. Silk and from the Greyvan Lines. The Bureau has repeatedly, in many cases,[15] taken the position that the employment relationship for social security purposes ex-

[15] The Bureau's position is shown by the facts appearing in reported Social Security tax decisions, inasmuch as no suit is brought unless the Bureau has decided that an employment relationship exists, and that a tax is due. Illustrative cases, apart from the cases at bar are: truck-owner-drivers (*United States* v. *Mutual Trucking Co.*, 141 F. 2d 653 (C. C. A. 6); *Willard Sugar Co.* v. *Gentsch*, 59 F. Supp. 82 (N. D. Ohio); *Bedford Pulp & Paper Co.* v. *Early*, decided April 6, 1944 (E. D. Va.), not reported, but may be found in P-H Soc. Sec. Tax Service, vol. 1, par. 36,010); taxi drivers leasing cabs from company (*Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C. C. A. 4)); bulk oil distributors owning trucks (*Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2); *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *Glenn* v. *Standard Oil Company*, 148 F. 2d 51 (C. C. A. 6); home workers (*Glenn* v. *Beard*, 141 F. 2d 376 (C. C. A. 6), certiorari denied, 323 U. S. 724); miners working under a leasing arrangement (*Anglin* v. *Empire Star Mines Co.*, 129 F. 2d 914 (C. C. A. 9)); outside salesmen (*McGowan* v. *Lazeroff*, 148 F. 2d 512 (C. C. A. 2)); *Stone* v. *United States*, 55 F. Supp. 230 (E. D. Pa.); *Pure Baking Co.* v. *Early*, decided April 24, 1943 (E. D. Va.), not reported but may be found in P-H Soc. Sec. Tax Serv., vol. 1, par. 36,005).

tends to situations within the borderland as to which there might have been doubt at common law. It can be of no significance in this case that the Bureau of Internal Revenue has verbalized its conclusions in terms of "control." As we have seen, the same facts that bring a relationship within the purposes of this legislation will commonly show that the worker is actually at the beck and call of the person he is working for, and is thus subject to control in a realistic sense. As one of the truckers testified in this case, he was "as regular as any man is when he has to eat." (R. 64.)

The Social Security Board has been even more explicit in interpreting the Regulations as consistent with the doctrine of the *Hearst* case. In *Matter of William Edward Stanly,* Case No. 12–338, decided January 4, 1945, the Appeals Council observed:

> By way of contrasting the situation where there is an employment relationship with one where none exists, the regulation designates as those who are *not* employees individuals "who follow an independent trade, business, or profession, in which they offer their services to the public." Thus, the regulation recognizes that the mere "control" by one person over another's activities, or his right to exercise such control, although strongly indicative of an employer-employee relationship between the parties, is not necessarily determinative thereof since if one person renders his

services for another in the furtherance of his own independently established business, he is not that other's employee. Equally implicit in the Board's regulation, on the other hand, is the principle that an individual who performs service for another person which furthers the latter's business enterprise is the latter's employee, unless it clearly appears that he does so as an incident to the pursuit of his own "independent trade, business, or profession."

The "control test" which is applied in tort cases in ascertaining whether an individual should be held responsible for damages caused to or by one performing services for him (on the theory that "control" of the activities enables him to minimize the possibility of an injury) relates principally to the extent of authority exercisable by the alleged employer over the alleged employee at the time when an injury was occasioned. In our opinion, such a test has no apparent relevance to the problem of identifying the "employee" whose wage loss, due either to old age or death, it is the purpose of a social insurance system to alleviate. The more significant matter to be determined would seem to be rather whether the individual in question is, or was, dependent upon the actions of another with respect to circumstances conditioning his opportunity to derive a livelihood from his personal efforts. In some situations such dependence may result from the same facts which indicate

> also the presence of "control," while in others there may be dependence without actual "control" or the right to exercise it.

The Appeals Council then went on to quote approvingly from the *Vogue* and *Hearst* cases. In reaching a result based in large part on the extent to which the workers' activities are independent of or a part of the employer's business, the Council was manifesting the view that such a standard was entirely consistent with the Regulations. This position of the Council, we are authorized to state, has met with the full approval of the Social Security Board and the Federal Security Administrator.

If there should be a question as to whether the Regulation permits the employment relationship to be construed in the light of the statutory purpose in borderline cases, one further established principle is pertinent. The Regulations are, of course, not conclusive. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358. All doubts as to their meaning should be resolved in favor of the result most consistent with the well-known purposes of the Social Security Act, and accordingly in favor of the validity of the Regulations themselves. Both administrative agencies are construing the Regulations in such a manner, and there is no reason why the courts should not do so.

D. THE PROPOSED 1939 AMENDMENT

It has been suggested that the failure of Congress to enact a proposed amendment submitted

with the Social Security amendments of 1939, which would have enlarged the definition of "employee" specifically to include salesmen, indicates that the common law concept of the term is in accordance with the legislative intention. *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. C. A. 6). We think these courts have attached a wholly wrong significance to the amendment proposed in 1939 and to its rejection. What happened is simply that the House of Representatives adopted, but the Senate and ultimately the Congress rejected, a special rule of thumb for determining the coverage of salesmen.[16] In general, under the amendment, a salesman would have been covered if he was a servant at common law, and if not, would nevertheless have been covered unless he was a broker or factor selling on behalf

[16] "(6) The term 'employee' includes an officer of a corporation. It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (but who is not an employee of such person under the law of master and servant); unless (A) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (B) such services are casual services not in the course of such individual's principal trade, business, or occupation." H. R. 6635, 76th Congress, sec. 801 (b).

of more than one company and employing at least one assistant salesman in his brokerage or factoring business, or unless the selling was "casual service" not in the course of his principal occupation. The stated intention of the Ways and Means Committee was "to set up specific standards" so that salesmen "may be uniformly covered without the necessity of applying any of the usual tests." (H. Rep. No. 728, 76th Cong., 1st sess., p. 76.) The amendment was stricken by the Committee on Finance of the Senate in the belief that the existing law should continue to be limited to "employees" (S. Rep. 734, 76th Cong., 1st sess., p. 75 (1939–2 Cum. Bull. 565)), and the House receded (H. Conference Rep. No. 1461, 76th Cong., 1st sess., p. 14 (1939–2 Cum. Bull. 593)).

On any view this amendment would have changed the law, since no such rule of thumb can be found in any definition of employee, either under the "common law" tests or the *Hearst* case. As noted, it was for the express purpose of avoiding "the usual tests" that the amendment was proposed. Under the amendment, for example, a broker or a factor would have been covered, however many the companies for which he might be engaged in selling, provided only that he employed no assistant salesman. Neither economic dependence, control, nor any of the other usual criteria would have had any relevance, if the statutory conditions were met. A broker or factor who em-

ployed no assistant, even though he might be in every sense and for all other purposes an entrepreneur, would have been declared for this purpose automatically an "employee" of every company for which he was engaged in making sales. The rejection of an amendment which on any view would have changed the law affords no reason to interpret narrowly the law which was left unchanged.

It cannot be said that in 1939, Congress intended the limitation of coverage to employees to be narrowly construed, without regard for the purposes of the statute. That the mere use of the word "employee" does not manifest legislative approval of any such restrictive construction was held in the *Hearst* case, which shows that the concept of employee was sufficiently flexible even at common law to permit an interpretation in accordance with statutory objectives without departing from the "ordinary" meaning of the word. The series of cases applying the Social Security Act definition narrowly did not commence until 1941,[17] so that Congress was not ratifying any such interpretation when it declined to change the statute in 1939. Indeed, in 1937 and 1938, the Treasury had ruled that truck owner-drivers were employees of the companies for whom they worked. S. S. T. 307, Cum. Bull. 1938–2, p. 279; S. S. T. 198, Cum.

[17] *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2), decided April 4, 1941, is the first appellate decision in this line.

Bull. 1937–2, p. 393; S. S. T. 259, Cum. Bull. 1938–1, p. 397.[18]

II

THE WORKERS HERE INVOLVED ARE EMPLOYEES OF RESPONDENT

For reasons to be stated, we think that even under the tort liability test both the unloaders and the truckers are respondent's employees. But if we are incorrect as to that, these workers unquestionably fall within the borderline area, in which the weight of the additional factors of their economic dependence upon and integral relationship to the respondent's business is sufficient to shift the balance in favor of coverage.

A. THE FACTORS TO BE STRESSED UNDER THE SOCIAL SECURITY ACT

That the workers are engaged in activities which are both essential to and an integral part of respondent's enterprise cannot be doubted. The unloaders shovel coal from railroad cars into bins in respondent's yards. The truckers deliver coal to respondent's customers, and collect the price for respondent. These are activities which

[18] In A & C Mimeo. No. 5722, July 22, 1944, the Bureau subsequently acquiesced in the contrary decision in *United States* v. *Mutual Trucking Company*, 141 F. 2d 655 (C. C. A. 6). That acquiescence was induced in large part by the Solicitor General's determination not to petition for certiorari. Until the present conflict arose between the instant case and *Grace* v. *Magruder*, 148 F. 2d 679 (App. D. C.), this Court was unwilling to review cases of this sort. *Glenn* v. *Beard*, 323 U. S. 724; *Grace* v. *Magruder*, 326 U. S. 720.

normally would be carried on by employees of the business. It is also clear that the workers are economically dependent upon respondents in the same sense as persons who are undoubtedly employees. The unloader and the four truckers who testified all declared that they worked steadily for respondent and received the major portion of their income from him. See pp. 3, 5–7, *supra*. It is not material that this may not have been true of all unloaders and truckers; it can be said of any group of employees that some work for the employer only for a short time. Any employee may quit when he wants to, or be discharged at the employer's will, and there is invariably some turnover. But it is just as true in this case as in the case of an unquestioned employment relationship that the workers continue to work steadily at the same job for long periods even though they are not legally required to do so.

The workers' dependence upon respondent and their integration in his business enterprise must be considered along with those factors, now to be discussed, which show that there is good reason even on tort principles, and in accordance with tort cases, for holding them to be employees. If all are taken together, we submit that there can be no doubt that the workers in question are covered by the Social Security Act.

B. THE COMMON LAW OR TORT LIABILITY TEST

The court below held the unloaders and truckers not to be employees but independent contractors.

The tort authorities almost universally agree that an independent contractor is one who, *exercising an independent employment,* contracts to do a piece of work according to his own methods and *without being subject to the control of his employer* except as to the result of his work. Restatement of Agency, Section 220; 2 Cooley, *Torts,* (3d ed.) 1098; 1 Thompson, *Negligence* (2d ed.) 568–570; 1 Shearman & Redfield, *Negligence* (Rev. ed.) 399; Smith, *Master and Servant* (1906 ed.) 299–301; cf. Article 205, Treasury Regulations 90 (Appendix, *infra.*) These elements, properly understood, are not present in this case.

The unloaders.—Many courts have held in tort cases that persons who unload coal from railroad cars or perform work of the same sort, are employees. *Swift & Company* v. *Alston,* 48 Ga. App. 649 (coal unloader); *Holmes* v. *Railroad Co. et al.,* 49 La. Ann. 1465 (coal unloader); *Martin* v. *Republic Steel Co.,* 226 Ala. 209 (pit digger); *Muncie Foundry, etc., Co.* v. *Thompson,* 70 Ind. App. 157 (coke unloader); *Chicago, R. I. & P. Ry. Co.* v. *Bennett,* 36 Okla. 358 (coal unloader); *Murray's Case,* 130 Me. 181 (coal unloader); *Decatur Ry. Co.* v. *Industrial Board,* 276 Ill. 472 (coal unloader); *Benjamin* v. *Fertilizer Co.,* 169 Miss. 162 (fertilizer unloader). These cases are directly in point.[19] In *Grace* v. *Magruder,* 148 F.

[19] *Chicago, R. I. & P. Ry. Co.* v. *Bond,* 240 U. S. 449, is not to the contrary. The contractor there contracted with several railroad companies to undertake different types of opera-

2d 670, certiorari denied, 326 U. S. 720, the Court of Appeals for the District of Columbia held that coal hustlers doing work indistinguishable from that here involved were employees even under the common law test.

The unloaders merely shovel coal, clearly a simple kind of unskilled labor. "Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost conclusively a servant in spite of the fact that he may nominally contract to do a specified job of a specified price." Restatement of Agency, Comment (e) on Section 220 (2), p. 486. See to the same effect *Sadler* v. *Henlock*, 4 E. & B. 570 (Q. B. 1854–1855); *Wass* v. *Bracker Construction Co.*, 185 Minn. 70; *Swift & Company* v. *Alston*, 48 Ga. App., at 651–652; 20 A. L. R. 745; 65 L. R. A. 495.

The unloaders were told what cars to unload and where the coal was to be placed. What further supervision was necessary? Men do not have to be told how to wield shovels. As the Georgia court stated with respect to identical employment in *Swift & Company* v. *Alston*, 48 Ga. App. 649, 652:

> * * * It is inconceivable to this court that a large corporation of the character of the defendant would hire an unskilled man

tions, work which obviously was to be performed by a number of employees. The contractor was thus the manager of a separate enterprise, not a "mere shoveler of coal under a superior's command". (p. 456).

> to perform one of the simplest tasks of hard manual labor, requiring scarcely more than muscle in its performance, yet one that must be performed in the running of its industry, and absolutely relinquish all right of control and direction.

What constitutes control or supervision over the method and means of performing hired service is not subject to precise limits or definition, since the requirements of each case varies according to the nature of the work. The work may be such that little, if any, supervision is necessary, or even possible, if the employee has any experience whatsoever at the task he is performing; and the employer is not bound to waste time and effort upon useless supervision. As was observed in *Allied Mutuals Liability Insurance Co.* v. *DeJong*, 209 N. Y. App. Div. 505, 507:[20]

> So, too, with the question of supervision. One may be sent into a forest to fell trees or be sent to his home to sew garments and in either case be none the less an employee. If the employer chooses to order work so done as to waive supervision, this does not make the employee less an employee.

The statement of the Supreme Court of Wisconsin in *Allaby* v. *Industrial Commission*, 200 Wis.

[20] This case involved home workers, whose hours were not controlled, who did not work exclusively for the employer, who obviously were not supervised in detail, and who were paid by the piece. It reviews the New York decisions holding such persons to be employees.

611, 614, in holding wood cutters to be employees is pertinent here.

> What details of any consequence were there left to the exclusive control of Rogers [the employee]? There only remained for him to control the extent and time of the application of his muscular power * * *.

Many courts have indicated that the most important difference between an employee and an independent contractor lies in the right of the employer to terminate the relationship at will without liability.[21] *Industrial Commission* v. *Bonfils*, 78 Colo. 306 (coal hauler); *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254 (log hauler); *Martin* v. *Republic Steel Co.*, 226 Ala. 209 (pit digger); *Showers* v. *Lund*, 123 Neb. 56 (gravel hauler); *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 111 (lumber hauler); *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298 (log hauler); *Muncie Foundry, etc., Co.* v. *Thompson*, 70 Ind. App. 157 (coke unloader); *Holmes* v. *Railroad Co. et al.*, 49 La. Ann. 1465 (coal unloader); *Decatur Ry. Co.* v. *Industrial Board*, 276 Ill. 472 (coal unloader); *Murray's Case*, 130 Me. 181 (coal unloader).[22] As we have seen, *supra*, pp. 28–30, the significance of the right to terminate the relationship at will is that this alone, even in the absence of a showing of control actually exercised, is sufficient to sub-

[21] The independent contractor, as distinguished from the employee, is hired for a particular job and cannot be discharged without liability until the job is finished.

[22] These citations are taken only from cases involving unloaders and truckers such as are involved in this case.

ject the worker to the employer's authority. For the worker, in danger of being fired at will, is "from a practical standpoint * * * in a position of complete subservience". *Burruss* v. *B. M. C. Logging Co., supra,* at p. 258. See also *Showers* v. *Lund, supra.* As the Supreme Court of Colorado declared in *Industrial Commission* v. *Bonfils,* 78 Colo. 306, 308, a decision frequently cited in other states (and which is directly in point insofar as the truckers here involved are concerned):

> * * * By virtue of its power to discharge, the company could at any moment direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. *Franklin Coal & Coke Co.* v. *Ind. Com.,* 296 Ill. 329, 129 N. E. 811. The most important point "in determining the main question (contractor or employee), is the right of either to terminate the relation without liability." *Industrial Com.* v. *Hammond,* 77 Colo. 414, 236 Pac. 1006. This is a confirmation by this court of the rule above stated as to control, because the right immediately to discharge involves the right of control.

See also *Jones* v. *Goodson,* 121 F. 2d 176, 179 (C. C. A. 10), which states that "the right of discharge is a factor strongly indicating that the relationship exists", citing many cases.

In this case, although there was no formal con-

tract of hire, the relationship between respondent and the workers was obviously terminable by either at will. Inasmuch as the workers were dependent upon respondent for their main livelihood, they would not be likely to reject his instructions or suggestions, if he found it necessary to give any, any more than the employees in the cases cited. Since they may be ordered to quit at any time if their work is unsatisfactory, nothing further is necessary to subject them to the respondent's control.

The fact that the workers were permitted to work when they wanted and were usually paid by the ton instead of by the hour does not prevent them from being employees. *Swift & Company* v. *Alston*, 48 Ga. App. 649; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Kirk* v. *Lime Co. and Insurance Co.*, 137 Me. 73; *Warner* v. *Hardwood Lumber Co.*, 231 Mich. 328; *Showers* v. *Lund*, 123 Neb. 56; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254. Clearly the unloaders had none of the indicia of independent businessmen. They had neither a specialized skill nor any equipment except a shovel and pick.

It is true, in a sense, that the unloaders (and also the truckers) were "itinerant workers", as the court below described them (R. 91). That fact, however, is not pertinent to the inquiry, as was pointed out in the *Grace* case. The Social Security Act does not exempt itinerant workers. Title VIII specifically exempts "casual labor not

in the course of the employer's trade or business". 42 U. S. C. Sec. 1011 (b) (3). This strongly indicates that workers such as those here involved would be covered even if their work could be described as "casual", inasmuch as their activities were clearly performed in the course of the respondent's business. Cf. *Thompson* v. *Twiss,* 90 Conn. 444; *State ex rel. Northfield* v. *District Court,* 131 Minn. 352; *Sabella* v. *Brazileiro,* 86 N. J. L. 505. Furthermore, the limitation upon the exemption shows that Congress intended the Act to reach persons who earn their livelihood performing services in another's business. Under Title IX there is no exclusion for any type of casual labor; the definition of an "employer" as one who has eight or more persons in his employ *for some portion of the day,* indicates that the duration of employment is not an excluding factor. Section 907 (a), Social Security Act.

The truckers.—In many important respects what has been said as to the unloaders is also true as to the truckers. Many, although by no means all, courts in tort cases have held truckers such are are here involved to be employees.[23] *Industrial Commission* v. *Bonfils,* 78 Colo. 306; *Coppes Bros. & Zook* v. *Pontius,* 76 Ind. App. 298; *Burruss* v. *B. M. C. Logging Co.,* 38 N. M. 254; *Bradley* v. *Republic Creosoting Co.,*

[23] It is frequently stated in this field that each case turns on its peculiar facts. Although the facts in some of the cases here cited vary in minor respects from those in the present case, this is not true as to many of the cases cited. These are not, in our opinion, distinguishable at all.

281 Mich. 177; *Rouse* v. *Town of Bird Island*, 169 Minn. 367; *Industrial Commission* v. *Hammond*, 77 Colo. 414; *Maher* v. *Coal & Coke Co.*, 323 Mo. 799; *Kirk* v. *Lime Co. and Insurance Co.*, 137 Me. 78; *Showers* v. *Lund*, 123 Neb. 56; *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 111; *Dunn* v. *Reeves Coal Yards Co., Inc.*, 150 Minn. 282; *Waters* v. *Pioneer Fuel Co.*, 52 Minn. 474; *Warner* v. *Hardwood Lumber Co.*, 231 Mich. 328; *Frost* v. *Blue Ridge Timber Corp.*, 158 Tenn. 18; *Lee* v. *Mark H. Brown Lumber Co.*, 15 La. App. 294. *Contra: Norton* v. *Day Coal Co.*, 192 Iowa 160; *Burns* v. *Eno*, 213 Iowa 881; *In re Estate of Amond*, 203 Iowa 306; *Southern Surety Co.* v. *Shoemake*, 24 S. W. 2d 7 (Tex. Com. App.).

The ticket which respondent gives the trucker accepting an order tells him where and when (if time is material) the coal is to be delivered, the type and amount of coal, whether the coal is to be sprayed or stacked, the price, and how the price is to be collected (see p. 7, *supra*). The trucker loads the coal, often using respondent's conveyor, and then delivers it in the manner indicated. For any person at all familiar with the work and the community no other instructions were necessary. A driver who did not own his own truck would also merely have to be told what kind of coal to load and where to deliver it; he would not have to be told what route to take or how the coal should be loaded or unloaded. Cf. *Burruss* v. *B. M. C. Logging Co., supra; Warner* v. *Hardwood Lumber Co., supra.* Thus, although

there could be no doubt that he was an employee, he could be subjected to no greater supervision or control than the truckers here.

The remarks of one of the witnesses typify the relationship. B. M. Tyner, who had driven for respondent for about 19 years (R. 74), when asked whether he had any understanding with respondent about following the directions of anyone, stated that he did not (R. 78). But in answer to the court's question, "There was no boss around?" he replied, "Well, he [Mr. Silk] was the only one. A man would naturally think he would be boss. If you haul coal, you would naturally take orders from him." (R. 78.)

The relation between the respondent and the truckers was, of course, terminable at will. For the reasons set forth, *supra*, pp. 28–30, 50–51, this in itself was sufficient to establish respondent's right of control, whether or not he found it necessary to exercise his authority. Indeed, most of the cases cited on pp. 50–51 were concerned with truck drivers.

It is also clear from the manner in which the enterprise was operated that respondent held himself responsible to outsiders for the conduct of the truckers. Customers made their complaints to respondent when the truckers had not properly cleaned their premises or had damaged their property. Respondent then took care of the cleaning and damage without charging the truckers. See p. 8, *supra*. Respondent also required that the trucks be insured, paying the

premiums originally himself and then charging the amount to the trucker (R. 40).

The court below relied on the freedom of the truckers in respect to working hours, and implied that their work for respondent was spasmodic and irregular. But the record shows that in fact the truckers reported for work early in the morning (R. 49–50, 60, 68, 75) and regularly, often for many years (see pp. 5–7, *supra*). The large number of trips which the trucks averaged each day (*supra*, pp. 6–7) indicates that, despite the right to reject hauls and to choose their own hours, the truckers worked as steadily as ordinary employees.

The fact that they were paid on a piece work basis does not, of course, prevent them from being employees. Cf. *United States* v. *Rosenwasser*, 323 U. S. 360. Their dependence upon the business for their livelihood was such that even without attempting to control their hours respondent could be sure that they would be available to perform the work at satisfactory times.

The truckers' ownership of the trucks does not prove that the drivers are not employees. Ownership of equipment is a factor to be taken into consideration in determining whether the employment relationship exists. But the ownership of an automobile or truck used in one's work does not establish that the driver is engaged in an independent enterprise. A great many cases have

so held. See the cases cited, pp. 53–54, *supra*,[24] and *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518. A person may own his own truck and still be nothing more than a truck driver for the person whose product he hauls.

Clearly the record does not establish that the haulers were engaged in a general hauling business of their own. Instead, they were, in effect, merely truck drivers who owned their own trucks. They were engaged in selling their labor, rather than skill and experience; the work which they were performing was not the sort of work which requires the services of a specialist in a particular business, trade, or profession. The respondent was dependent upon these truckers to perform a necessary and regular step in the day to day operation of his business. They were dependent upon him for their day to day livelihood.

The nature of the work, type of compensation, and the workers' relationship to the public had no similarity to that of a lawyer, physician, engineer, construction contractor, broker, or business man whose relationship with his clients or customers is traditionally characterized by a genuine

[24] Social Security cases so holding are: *Willard Sugar Co.* v. *Gentsch*, 59 F. Supp. 82, 84 (N. D. Ohio); *Grand Rapids Gravel Co.* v. *United States* (W. D. Mich.), decided March 30, 1943 (1 P-H Social Security Tax Service, par. 33,786.60); *Bedford Pulp and Paper Co.* v. *Early* (E. D. Va.), decided April 6, 1944 (1 P-H Social Security Tax Service, par. 36,010). But cf. *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. C. A. 6).

independence and separation from the affairs of the employer's business. Cf. *Gulf Refining Co.* v. *Brown*, 93 F. 2d 870 (C. C. A. 4). To describe the workers, both unloaders and haulers, as being engaged in an independent trade, business, occupation, or profession would be a perversion of the terms.

In short, the truckers were not independent of the respondent's business and they were subjected to as much direction and control as was needed for the work they were doing. Even for purposes of tort liability this should suffice to make them employees.

C. THIS COURT IS NOT BOUND BY THE FINDINGS OF THE COURTS BELOW

Respondent has suggested (Brief in Opposition, p. 15) that the findings of the two lower courts in this case are binding upon this Court both because of Rule 52 (a) of the Federal Rules of Civil Procedure requiring appellate courts to accept findings *of fact* unless clearly erroneous, and by reason of this Court's policy against reviewing fact findings on which two lower courts have concurred. To the extent that these findings are inconsistent with the undisputed facts set forth in the Statement, they are "clearly erroneous" within the meaning of Rule 52. The rules referred to, however, apply only to fact finding in the strict sense, not to non-factual conclusions. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670; *United States* v. *Appalachian Power Co.*, 311 U. S.

377, 404; *Bridges* v. *Wixon*, 326 U. S. 135. The question of the application of a statute to a particular situation has often been held to present a question of law for the appellate court, both generally [25] and in Social Security tax cases raising the very type of questions involved here.[26] In this case the question whether on the undisputed facts the truckers and unloaders are employees is not a factual one but one calling for the Court's conclusion of law as applied to the admitted facts.[27] And the basic issue as to the test

[25] *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704, 705–706 (C. C. A. 3); *United States* v. *Anderson*, 108 F. 2d 475, 478–479 (C. C. A. 7); *Murray* v. *Noblesville Milling Co.*, 131 F. 2d 470, 474 (C. C. A. 7), certiorari denied, 318 U. S. 775; *Duquesne Club* v. *Bell*, 127 F. 2d 363, 364–365 (C. C. A. 3), certiorari denied, 317 U. S. 638; *Local No. 6167* v. *Jewell Ridge Coal Corp.*, 145 F. 2d 10, 12 (C. C. A. 4), affirmed, 325 U. S. 161; *Becker* v. *Loew's Inc.*, 133 F. 2d 889, 894 (C. C. A. 7); *Himmel Bros. Co.* v. *Serrick Corp.*, 122 F. 2d 740, 742 (C. C. A. 7); *United States* v. *Armature Rewinding Co.*, 124 F. 2d 589, 591 (C. C. A. 8).

[26] In these cases (of which the following are but a few) the power of the appellate court to redetermine the ultimate conclusion as to employment status is assumed. *Williams* v. *United States*, 126 F. 2d 129 (C. C. A. 7), certiorari denied, 317 U. S. 655; *Ridge Country Club* v. *United States*, 135 F. 2d 718 (C. C. A. 7); *Deecy Products Co.* v. *Welch*, 124 F. 2d 592 (C. C. A. 1); *Government Personnel Auto. Ass'n* v. *United States*, 124 F. 2d 99 (C. C. A. 5); *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5).

[27] The matters as to which the reviewing court is bound by the findings below are not the same as when findings of administrative bodies are being reviewed. The mixed question as to which an administrator's finding may be binding if rationally supported (*Dobson* v. *Commission*, 320 U. S. 489; *National Labor Relations Board* v. *Hearst Publications*,

to be employed in interpreting the statutory phrase "employment" clearly presents a question of law.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be reversed.

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FEBRUARY 1947.

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323 U. S. 111) are open for determination *de novo* under Rule 52 (a). See cases cited, note 25, *supra*. This result is supported not only by the history of Rule 52, but by the fact that on such matters, which are not purely factual, the trial judge does not have any such advantage over the appellate court resulting from superior expertness or specialization as does the administrative body in whom Congress has vested discretionary authority. This problem is discussed at some length in Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harvard Law Review 70, and particularly, 112–122.

APPENDIX

Social Security Act. c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

* * * * *

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: * * *

(42 U. S. C. 1940 ed., Sec. 1001.)

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date * * *

(42 U. S. C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * *

(42 U. S. C. 1940 ed., Sec. 1011.)

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE.

* * * * * * *

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *

(42 U. S. C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

* * * * * * *

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * *

(42 U. S. C. 1940 ed., Sec. 1107.)

Sections 1400, 1401 (a) (b), 1410, 1426 (a) (b), 1600 and 1607 (b) (c) of the Internal Revenue Code, in so far as pertinent here, are substantially the same as Sections 801, 802 (a), 804, 811 (a) (b), 901, and 907 (b) (c) set out above.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

> ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.
>
> The words "employ", "employer", and "employee", as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.
>
> Whether the relationship of employer and employee exists, will in doubtful cases

be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if

the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

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Article 3, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, insofar as pertinent here, is substantially the same as Article 205 of Treasury Regulations 90 set out above.

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